Singapore identity card in order to exchange it for a Federation identity card. However, that case was only concerned with the appeal against conviction. Each case depends essentially on its particular facts. In *PP v. Mohamad Fathi bin Haji Ahmad* [1979] 2 MLJ 75, for example, the appellate Court, in quashing a binding over order made under s. 173A of the Criminal Procedure Code, fined the offender RM10,000 in default 2 years' imprisonment. In my opinion, decisions on sentence in particular cases cannot be regarded as binding precedents (except on technical matters), though they maybe cited as examples of how a particular type of case had been dealt with in the past and may be useful as an aid to achieve uniformity of sentence for cases bearing apparent similarities without being authoritative in the strict sense.

In the instant case, it is indeed rather naive to think that the criminal act as in the present case and in a relatively close society like Kuching would not be easily detected. The loan, however, had not been approved. No one had suffered any financial loss. The Accused was a first offender and is a man with a high education background whose career would be affected by even the mere fact of a conviction. In the circumstances, the sentences of imprisonment for 12 months and a fine of RM5,000 is, in my opinion, unreasonable and manifestly excessive. A fine, I think, would be adequate punishment. The sentence of imprisonment is set aside. The fine of RM5,000 is affirmed. To that extent the appeal against the sentence is allowed.

LAI SOON CHEONG

v.

KIEN LOONG HOUSING DEVELOPMENT SDN. BHD. & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. F 323 OF 1984]
11 SEPTEMBER 1992

LAND LAW: Sale and purchase of shophouse - Developer creating further encumbrance without approval of purchaser • Whether charges bank knew of previous charge - Priority of charges - Defeasibility of title - Allegation of fraud.

The plaintiff agreed to purchase a shophouse from the 1st defendant, who were developers. It was a condition of the sale and purchase agreement that the 1st defendant should not create further encumbrances other than those already subsisting as at the date of sale and purchase without the approval of the plaintiff. The 1st defendant without the knowledge and approval of the plaintiff created a third party charge, over the lots where the plaintiffs shophouse was to be built, in favour of the 2nd defendant. The charge was registered on 11 February 1992.

The development of the property was abandoned and as the 1st defendant failed to make payments, the 2nd defendant instituted proceedings. The plaintiff lodged a caveat on the said property on 31 May 1992.

Held:

[1] There is no doubt in the circumstances of the present case the that plaintiff has acquired only a right *in personam* to the said property against the 1st defendant, as vendor personally particularly since he has indicated in his pleading as well as in his evidence, that he is ready and willing to pay the balance of the purchase price thereby fulfilling his obligations under the said agreement. But his right *in personam* is not good against the 2nd defendant. On the other hand the 2nd defendant has acquired a right *in rent* to the said property under the charge which had been duly registered. Their right is a real right good against the world as a whole.

[2] It is idle to suggest that the 2nd defendant or DW1 (an employee of 2nd defendant) is privy to the fraud committed by the 1st defendant against the plaintiff. Upon a careful review of the facts and circumstances of the present case, the most that can be said against the 2nd defendant is that they have been negligent in not carrying out further enquiries. But negligence *per se* does not and cannot amount to fraud.

[3] There is no law which provides that before a chargee can accept a charge on land which is to be developed by a developer as a housing project wherein the sub-divided lots with buildings to be constructed thereon are to be sold to members of the public, the said chargee must ensure that no sale of the undivided lots has yet been carried out or that no sale and purchase agreement has been executed by the chargor.

[4] There is no evidence in the present case that the plaintiff has obtained leave of Court to proceed with this action against the 1st defendant in liquidation. The fact that the plaintiff did not proceed to apply for judgment in default of pleading and even at the trial of the case suggests that he knows that the 1st defendant is in no position financially to comply with any order of the Court prayed for by the plaintiff.

[Plaintiff's claim against the 1st defendant and 2nd defendant dismissed with costs].

Casesreferred to:

Datuk Jaginder Singh v, Tara Rajaratnam [1983]2 MLJ 196 (foll)

Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors. [1988]2 MLJ40 (foll)

Assets Co. Ltd. v. Mere Roihi & Ors. [1905]AC 176 (cit)

Wainiha Sawmilling Co. Ltd. v. Waioue Timbre Co. Ltd. [1926]AC 101 (cit)

Tai Lee Co. Sdn. Bhd. v. Official Assignee & Ors. [1983] 1 MLJ81 / [1983]1 CLJ 183 (cit)

Legislationreferred to:

Companies Act 1965, s. 226(3)

Housing Developers (Control & Licensing) Rules 1970 rr.4,12(1)(b)

National Land Code 1965 ss.240(2), 256(2), 340(1), (2) & (3)

Specific Relief Act 1950, s. 23(b)

For the plaintiff - Wilfred Abraham, K. Chandra & Rodney Gomez;M/s. K. Chandra & Co.

For the second defendant - C.Y. Chung;M/s. Sothi & Ang

JUDGMENT

Lam Beng Choon J:

In this civil suit the plaintiff's claim is based on a sale and purchase agreement ("the said sale and purchase agreement") entered into by the plaintiff and the 1st defendant on 4 May 1981 whereby the 1st defendant agreed to sell one lot of land held under a Document of Title No. H.S.(D) B/P 56/80, P.T. 4042 Mukim of Ulu Bernam Timur, Batang Padang Perak together with the double storey terrace shophouse building to be constructed thereon (hereinafter referred to as "the said property") to the plaintiff at the purchase price of RM163.910 which was to be paid on an instalment basis in the manner as provided in Clause 3 of the said sale and purchase agreement. The plaintiff alleged that he had paid a total sum of RM74,410 as deposit and part payment of the purchase price. He further alleged that Clause 16 of the said sale and purchase agreement contained a prohibition against subjecting the said property to any further encumbrances other than those already subsisting as at the date of the said sale and purchase agreement save with the consent of the plaintiff. Furthermore by the provisions of r. 12(1)(b) of the Housing Developers (Control and Licensing) Rules 1970 no encumbrance could be created upon the said property without the prior approval of the plaintiff. Clause 17 of the said sale and purchase agreement provided that the completion and delivery of vacant possession of the said property would be, subject to certain exceptions which are not applicable in the present case, within 18 calendar months from the date of the said sale and purchase agreement that is to say on or before 4 November 1982. The plaintiff went on to allege that on or about 11 February 1982 the 1st defendant dishonestly and fraudulently created a third party charge over the lots known as P.T. 4040 to 4121 and 4128 to 4194 of the land comprising a housing project which was in the process of development by the 1st defendant inclusive of lot P.T. 4042 held under the aforementioned document of title, in favour of the 2nd defendant. The charge was duly registered on 11 February 1982 notwithstanding that the plaintiff had never given his approval to subject the said property to any charge. The plaintiff's complaints concerning the 2nd defendant are that the 2nd defendant had knowledge of the existence of the said sale

and purchase agreement entered between the plaintiff and the 1st defendant and also of the beneficial interest of the plaintiff in the said property. The 2nd defendant knew that the 1st defendant was charging the various lots of the said land mentioned earlier dishonestly and fraudulently. The 1st defendant was not only in breach of Clause 16 by charging lot P.T. 4042 to the 2nd defendant, they were also in breach of Clause 17 of the said agreement in that the construction of the building on the said property was abandoned and the transfer of the said property to the plaintiff was consequently never made. Apparently the borrower failed to make payments under the loan agreement executed between them and the 2nd defendant and as a result the 2nd defendant instituted proceedings under Originating Summons F783 of 1983 to apply for an order of Court to sell the various lots of land so charged by public auction pursuant to s. 256(2) of the National Land Code 1965. An order for sale of the various lots inclusive of lot P.T. 4042 was duly granted and the said lots were to be sold by public auction on 11 August 1984. The proclamation of sale was advertised in the local newspapers and upon reading the advertisement the plaintiff therefore instituted this action against the two defendants. The reliefs asked for by the plaintiff against the 1st defendant are

(i) specific performance of the sale and purchase agreement
(ii) an injunction to restrain them from selling or otherwise dealing with lot P.T. 4042 and
(iii) general damages.

As against the 2nd defendant the plaintiff prayed for

(i) an injunction to restrain the 2nd defendant from proceeding with the sale by public auction of lot P.T. 4042,
(ii) the charge of the various lots under presentation 2052/82 Jilid No. 1219 Folio 38 be declared null and void and
(iii) the order of sale by public auction granted by the Court to the 2nd defendant be set aside wholly or in respect of lot P.T. 4042.

In their defence the 2nd defendant averred that the various lots of land mentioned earlier were lawfully charged to them. At the time of the registration of the charge there were no encumbrances on any of the said lots, and more importantly the plaintiff had not registered his interest in respect of lot P.T. 4042 nor lodged a caveat thereon at the material time. The 2nd defendant had no knowledge of the sale and purchase agreement entered between the 1st defendant and the plaintiff and that they had not committed fraud; neither did they conspire with the 1st defendant to defraud the plaintiff.

In essence the 2nd defendant contends that at all material times they had acted properly and with due propriety.

At the trial the plaintiff himself testified on his own behalf and in addition he called eight other witnesses to testify to sustain his case including the solicitor, one Foong Soo Nam (PW6), who at the material time acted as solicitor for both the plaintiff as purchaser and the 1st defendant as vendor of the said property. PW6 also prepared the sale and purchase agreement on the instruction of the 1st defendant.

The 1st defendant on the other hand, had not entered any appearance; neither did they file any statement of defence although according to the Counsel the writ and statement of claim had been duly served on them. Furthermore they also failed to appear at the trial of this case.

The 2nd defendant called only one witness, Liew Chee Fah, who was the Senior Operation Officer of the 2nd defendant company at the material time.

Upon an ultimate analysis of the totality of the evidence adduced in the trial, the following facts can be extracted therefrom which to my mind are indisputable:

At the material time the 1st defendant was engaged in developing the various lots of land (which included the lot PT. 4042 subsequently sold to the plaintiff) into a housing estate known as "Taman Seri Tangga." They applied for and obtained a permit on 10 February 1981 to advertise the development of this housing estate pursuant to r. 4 of the Housing Developers (Control and Licensing) Rules 1970. The permit allowed them to construct 45 units of double storey shophouses, 36 units of double storey terrace houses and 48 units of single storey terrace houses (see exhibit P5). The development of the housing estate attracted quite a number of potential buyers amongst which was the plaintiff. Apparently the plaintiff made some enquiries about this project and he happened to meet one Chai Min Kee ("Chai")

who was at the material time one of the directors of the 1st defendant (see exhibit 'P2') and also the authorised agent of the 1st defendant to deal with all transactions regarding the sale of the several units of shophouses to be built in the housing estate (see evidence of PW6). As a result of the meeting with Chai, the plaintiff went to the office of the 1st defendant's solicitors Syarikat S.N. Fong, on 18 March 1981 where he paid two sums of money by bank drafts of RM15,500 and RM8,500 to Chai who received them on behalf of the 1st defendant. Two receipts were duly issued in acknowledgment of the two sums of money as part payment of the purchase price of RM163,910 of the said property (see exhibit 'P8'). A sum of RM391 as legal fees was also paid by the plaintiff (see exhibit 'P9'). However the plaintiff testified that he was told by Chai to pay another sum of RM50,000 if he wished to buy the said property. Chai requested that this sum should be paid in cash. I should mention that Counsel for the 2nd defendant in his submission contended that this sum of RM50,000 was never paid to Chai at all and even if it were paid (which he disputed) it was paid as under the counter money to Chai and not to the 1st defendant. From my scrutiny of the totality of the evidence I am satisfied that the plaintiff did pay the sum of RM50,000 as his assertion was fully corroborated by the testimony of PW5 one Woo Foo Chai a retired Senior Health Inspector. He testified that he went with the plaintiff to the solicitors' office and saw the plaintiff pay the two bank drafts referred to by the plaintiff in his evidence and also another sum of RM50,000 in cash as demanded by Chai on behalf of the 1st defendant. Chai did not issue a receipt but promised to do so later. The plaintiff's allegation was also corroborated by circumstantial evidence which shows that he withdrew relatively large sums of money from his savings bank accounts and that he took a loan from PW7 who testified that he lent the plaintiff, who was the son of his cook at the material time, a sum of RM15,000 as the plaintiff required it to pay part of the purchase price of the shoplot he was buying in Tanjong Malim. The plaintiff did not show PW7 any receipt to acknowledge payment but he explained to PW7 that the developer had promised to issue the receipt later but they never did so. In fact they were avoiding him and he could not get the receipt up to today. As to the argument that the RM50,000 was paid as under the counter money again this contention is incompatible with the evidence of the plaintiff PW5 and PW7. In any event it is incredible that while the purchase price of the said property was only slightly more than RM150,000 the plaintiff would be prepared to pay another RM50,000 almost 1/3 of the agreed purchase price as under the counter money to get the shoplot.

Reverting to the facts, upon payment of the total sum of RM74.500 as deposit and part payment, the plaintiff signed the sale and purchase agreement (exhibit "AB1") on the same day but the said agreement was left undated. The date 4 May 1981 was inserted by someone later. The solicitor, Fong Soo Nam (PW6), who prepared the agreement, was shown the master title of the land and he found that there was no registered encumbrances over the land. But the document of title under which the said property was held as referred to in the opening paragraph of this judgment was never shown to PW6 although as can be seen later this document of title had already been issued to the 1st defendant. After execution of the agreement nothing further was done by the 1st defendant and the development project never took off the ground. No construction whatsoever was carried out and naturally the delivery of vacant possession of the said property was never fulfilled by the 1st defendant. At the time when the said agreement was signed in PW6's office the land held under the master title had already been subdivided into the various lots and individual title to each lot had already been issued. The document of title to the said property sold to the plaintiff was produced and marked as exhibit 'P10'. It bears the registration No. H.S.(D)B/P56/80 PT4042 and it also includes the prohibition Clause 16 and the completion of works Clause 17 as stated in the opening paragraph of this judgment. In early 1982 the 1st defendant intended to charge all the various lots (inclusive of lot P.T. 4042) as security for a loan of RM2,800,000 to be granted by the 2nd defendant to Pattaya Holdings Sdn. Bhd. At the material time the various lots were already charged to Magnum Finance Berhad as security for a loan. The 1st defendant had to pay to Magnum Finance Berhad the redemption sum, which they did, in order to get possession of titles of all the lots and to obtain a discharge of the Magnum charge before the 2nd defendant could execute the charge of the

various lots as security for the loan to Pattaya Holdings Sdn. Bhd. Thereafter the 2nd defendant made a search with the appropriate Land Office and found that there was no encumbrance entered in the titles. They also made enquiries as regards to the financial position of Pattaya Holdings Sdn. Bhd. The charge with the 2nd defendant was subsequently concluded and it was duly registered on 11 February 1982 under Presentation No. 2052/82, Jilid 1219, Folio 38. The charge instrument Form 16A of the National Land Code 1965 was signed by Lee Meow Tuck and Wong Kau on behalf of the 1st defendant. They were at the material time directors of the 1st defendant Company as well as directors of Pattaya Holdings Sdn. Bhd. (see exhibits 'P3' and 'P4'). All these charge transactions were not made known to the plaintiff; neither was he ever asked to give his consent to charge lot P.T. 4042. He only came to know about the charge when he saw the proclamation of sale of all the lots in question by public auction published as an advertisement in the newspaper. Apparently Pattaya Holdings Sdn. Bhd. failed to make payments in accordance with the loan agreement and the 2nd defendant applied to and obtained an order of Court to sell all the lots by public auction to be held on 11 August 1984. However the plaintiff, on the advice of his solicitor, had earlier lodged a caveat on the said property which was registered on 31 May 1982 (see exhibit 'P1') and thereafter instituted this action.

The 1st defendant had not only failed to send any of its authorised agents or servants to attend at the trial of this case, they had not even bothered to file in their memorandum of appearance or statement of defence. Under the circumstances it is incumbent on me to give judgment in favour of the plaintiff particularly when the evidence adduced at the trial showed that the 1st defendant had without any reasonable cause failed to carry out their obligation to construct and complete the shophouse and to deliver vacant possession of the said property to the plaintiff within the specified period. Indeed the 1st defendant had abandoned the entire project and even up to today they have failed to construct the shophouse and to deliver vacant possession of the said property to the plaintiff. For this reason alone judgment must be given in favour of the plaintiff. However that may be, I am also fully satisfied from the evidence adduced that in charging the said property to the 2nd defendant, the 1st defendant deliberately did so without the knowledge of the plaintiff. They deliberately went behind the back of the plaintiff to create the charge of the said property for fear of the plaintiff refusing to give his consent to the charging of the said property. Furthermore the 1st defendant also deliberately failed to mention that the said property had already been charged to Magnum Finance Berhad. In failing to inform the plaintiff of the Magnum charge and more importantly in creating the charge of the said property in such a furtive manner to avoid the need to obtain consent from the plaintiff the designed object of the charge was to cheat the plaintiff of his right to get delivery of the said property free from any encumbrance. Thus to my mind the 1st defendant has committed fraud as defined by Lee Hun Hoe CJ (Borneo) (as he then was) in the case *of Datuk Jaginder Singh v. Tara Rajaratnam* [1983] 2 MLJ 196 @ 201. It follows therefore there is this additional reason that judgment must be entered in favour of the plaintiff as against the 1st defendant. I shall, however, have more to say regarding the effect of the fraud *vis-a-vis* the charge created over the various lots of land. Until I have dealt with the effect of the fraud *vis-a-vis* the charge, it is not proper for me at this juncture to set out the terms of the order which should be made against the 1st defendant.

Turning to the plaintiff's case against the 2nd defendant there are in fact two questions posed to this Court *viz:*

(1) As the charge of the said property to the 2nd defendant had been duly registered under the National Land Code 1965, is there sufficient evidence adduced at the trial to establish that the indefeasibility of the 2nd defendant's legal interest under the said charge is defeated by reason of any one or more of the circumstances specified in sub-section (2) of s. 340 of the National Land Code 1965?

(2) If the answer to (1) is no, the next question is can the 2nd defendant's claim that their legal interest under the said charge has priority over the equitable interest of the plaintiff in the said property acquired by him pursuant to the sale and purchase agreement dated 4 May 1991?

In dealing with question (1), one must bear in mind that the grounds relied on by the plaintiff

to sustain his contention that the interest of the 2nd defendant under the said charge is defeasible are as follows:

(a) the 2nd defendant was a party or privy to the fraud or misrepresentation committed by the 1st defendant against the plaintiff; and
(b) the registration of the said charge was obtained by means of an insufficient or void instrument.

On the other hand the 2nd defendant is relying on the concept of indefeasibility of title or interest under s. 340 of the National Land Code 1965 to sustain their contention that their legal interest over the said property arising from the charge cannot be challenged since it was duly registered under the said Code. The 2nd defendant also contended that as the plaintiff is not the registered proprietor of the said property and he only has a beneficial interest over the said property by virtue of the sale and purchase agreement his interest cannot in law be awarded priority over the legal interest of the 2nd defendant particularly when the plaintiff failed to lodge a caveat over the said property prior to the registration of the charge.

In the face of these opposing contentions it is appropriate to examine the provisions of s. 340 of the National Land Code 1965. That section reads:

> 340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible -
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) -
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

It is clear from the grounds raised by the plaintiff to sustain his contention that the interest of the 2nd defendant under the charge is defeasible the plaintiff is in fact pegging his case under paragraph (a) (privy to the fraud and misrepresentation) and paragraph (b) (registration by an insufficient or void instrument) of subsection (2) of s. 340.

I have earlier given a summary of the evidence given by the witnesses appearing at the trial of this case. In the face of the opposing contentions of the parties it is necessary to scrutinise at some length the evidence given by three of the witnesses whose testimonies would be of much assistance to this Court in arriving at a proper determination of the issues raised by the parties. Firstly one Yap Kon Lim PW3, who was and still is attached to the Licensing and Advisory Division of the Ministry of Housing and Local Government, testified that the 1st defendant was issued with a housing developer advertising permit in respect of the development of a housing estate project known as Taman Seri Tangga on 11 February 1980 which was valid for one year (exhibit 'P5'). It was subsequently renewed twice and the final expiry date was 3 March 1983. In applying for the said permit the 1st defendant submitted their proposed press advertisement and a brochure. On 6 February 1980 they also furnished a specimen of the sale and purchase agreement to be executed between them and any potential purchaser (Exhibit 'P6'). P6 complied with the provisions of r. 12(1)(b) of the Housing Developers (Control and Licensing) Rules 1970. There was no necessity for the 1st defendant to furnish the said Ministry with a list of purchasers of the various lots of the land under development. Secondly Foong Soo Nam (PW6) sole

proprietor of Syarikat S.M. Poong, who acted as solicitor for both the 1st defendant and the plaintiff in the sale transaction of the said property said in his evidence that he prepared the sale and purchase agreement (Exhibit 'AB1') on the instruction of the 1st defendant. At the relevant time he was not shown the title of the said property (Exhibit P10). He did check the master title of the land. On checking the master title PW6 found that there was no registered encumbrances. Although PW6 was never shown the title of the said property Exhibit P10 nevertheless he was informed by Chai Min Kee, the director of the 1st defendant, that an application of the subdivision of the land held under the master title had been submitted to the Land Office and the application had been approved and separate title had been issued for each of the subdivided lots. Subsequently when PW6 found out that the said property was charged by the 1st defendant he wrote to the plaintiff about caveating the said property. With the plaintiff's consent the caveat (exhibit P1) was then lodged and registered on 31 May 1982. Finally we have the evidence of Liew Chee Fah (DW1) who was at the material time the Senior Operation Officer of the 2nd defendant. He testified that at the time when the charge agreement was executed between the 1st and the 2nd defendants, the latter had no knowledge of any sale and purchase agreement alleged to have been made by the plaintiff and the 1st defendant. DW1 was, however, aware that the 1st defendant had a licence to develop "that land in Tanjong Malim" meaning the Taman Seri Tangga housing estate. He was shown the housing developer advertisement licence issued to the 1st defendant (exhibit 'P5'). He went on to say that when the application for a loan was made by the 1st defendant for Pattaya Holdings Sdn. Bhd. a search was made with the Land Office and it was found that there was a charge over the land endorsed on the title entered by Magnum Finance Berhad. Thereupon the 1st defendant paid to Magnum Finance Berhad the redemption sum to obtain a discharge of the charge and thereafter created the charge of the various lots of land inclusive lot P.T. 4042 as security for the loan of RM2.8 million to Pattaya Holdings Sdn. Bhd. He asserted that at the time the charge was created the 2nd defendant acted *bona fide* without knowledge of the plaintiff's interest in the said property and there was no caveat lodged by the plaintiff. As Pattaya Holdings Sdn. Bhd. defaulted in payment of the loan the 2nd defendant commenced proceedings to apply for an order for sale of the charged lands. An order for sale by public auction was granted by the Court and when the auction was about to take place the plaintiff lodged a caveat (exhibit 'P1') over the said property. The auction was aborted because some of the purchasers of the various lots "encumbered the land". DW1 was asked to and did produce the loan application of Pattaya Holdings Sdn. Bhd. dated 14 January 1982 (exhibit P13). He agreed that the said application was signed by Lee Meow Tuck and Wong Kau as directors of Pattaya Holdings Sdn. Bhd. He also admitted that these two gentlemen were subsequently appointed as directors of the 1st defendant on 15 January 1982 and 21 January 1982 respectively. In fact as from 21 January 1982 the directors of the 1st defendant comprised of three persons namely Lee Meow Tuck, Wong Fatt and Wong Kau (see exhibit 'P3'). DW1 also agreed that at the time of the disbursement of the loan to Pattaya Holdings Sdn. Bhd. on 2 February 1982 the same three persons were the directors of the 1st defendant as well as the directors of Pattaya Holdings Sdn. Bhd. DW1 went on to explain that when the loan application was made the 1st defendant furnished, among other things, a valuation report of the lands to be charged. The valuation report dated 17 September 1981 was produced and marked as exhibit 'P14'. DW1 agreed that at p.5 of "P14" it was mentioned that the subject property has been approved for development into a housing scheme to be known as Taman Seri Tangga and details of the number and type of buildings to be constructed on the land in question were also given. Reading this statement and the details, DW1 agreed that one could conclude that the units of shoplots and other buildings to be constructed on the land in question would be sold to third parties. DW1 explained that when the application of the loan was made he was informed by Lee Meow Tuck, that the land in question was ready for development and that the 1st defendant would soon be launching the sale of the shoplots and other buildings to members of the public. The 2nd defendant also made enquiry with Pattaya Holdings Sdn. Bhd. as to whether the individual lots of land had been sold to third parties, and they were told that the launching of the sale of the individual lots had not yet been carried out and that it would be done later. DW2 also explained

the basic criteria which the 2nd defendant would take into consideration in dealing with a loan application. They would examine the capacity of the applicant to repay the loan, the capability of the applicant (to carry out the project), the value of the security offered, the terms of financing the loan and the "quality" of the guarantors. In this respect DW1 said that both the 1st defendant and Pattaya Holdings Sdn. Bhd. had satisfied the 2nd defendant that they were viable companies, and he himself was satisfied that the various lots of land to be charged had not yet been sold to third parties because

(i) when the 1st defendant subsequently granted consent of a 2nd charge to be credited over the various lots of land to D & C Bank there was no diminishing value of the land; and
(ii) the 1st defendant's first legal charge had been duly registered.

In their submissions, the Counsel acting for the respective parties had furnished this Court with a number of authorities involving the issue of fraud. Although I appreciate very much their effort in drawing my attention to these numerous authorities, there is no need for me to mention in this judgment all these authorities although I did scrutinise carefully each and every one of the said authorities. It is sufficient for me to cite two of those authorities and they are the Supreme Court cases of (i) *Lian Keow Sdn. Bhd. (In Liquidation) &Anor v. Overseas Credit Finance (M) Sdn. Bhd. & Ors.* [1988] 2 MLJ 440 and (ii) *Datuk Joginder Singh's* case to which reference has been made earlier. At p. 456 of the Lian *Keow Sdn. Bhd.'s* case Syed Agil Barakbah SCJ (as he then was) defined the word "fraud" appearing in s. 240(2) of the National Land Code 1965 thus:

> Fraud must not only be pleaded but also particularized in the pleadings. Fraud under the Code means actual and not constructive or equitable fraud. **Actual fraud must be proved in order to deprive a purchaser for value of the absolute title conferred by the Code. Actual fraud means dishonesty of some sort proved against the person whose registered title is impeached, or his *agents. Bona fide* mistake or negligence is not fraud and each case must depend on its own particular circumstances.** The equitable doctrine of constructive fraud has no application under the provisions of the Code. This is the view adopted by our courts based on the decision in *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* **The standard of proof required to prove fraud is proof beyond reasonable doubt** (see Mohamed Isa v..Haji Ibrahim and the list of authorities mentioned therein).
>
> (Emphasis supplied).

In the *Datuk Joginder Singh's* case *(supra)* Lee Hun Hoe CJ (Borneo) (as he then was) made reference to two Privy Council cases *viz Assets Co. Ltd. v. Mere Roihi & Ors. [* 1905] AC 176 and *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* [1926] AC 101,106,107. From his detailed examination of the judgments of these two cases His Lordship while agreeing that a registered proprietor who took a transfer with actual knowledge of an existing adverse claim against his transfer could still acquire an indefeasible title as his mere knowledge of the existence of the adverse claim did not amount to fraud nevertheless His Lordship took note of a passage from the speech of Lord Buckmaster in the *Waimiha's* case and went on to say at p. 201 of the reported case:

> Fraud may also be caused by deliberately and dishonestly registering an interest and then transferring the interest even before the ink is dry to another person without the consent of the original registered proprietor. The two authorities clearly show that fraud must be actual. **Thus fraud may occur where the designed object of a transfer is to cheat a person of an existing right or where by a deliberate and dishonest act a person is deprived of his existing right.**
>
> (Emphasis supplied).

However His Lordship also emphasised this caution as stated by Lord Buckmaster:

> It is not, however, necessary or wise to give abstract illustrations ... for each case must depend upon its own circumstances.

The abovementioned princples propounded by Syed Agil Barakbah SCJ and Lee Hun Hoe CJ (Borneo) clearly sum up the approach adopted by our Courts in a host of decisions. I should also mention that Syed Agil Barakbah SCJ in the *Lian Keow's* case laid stress on the distinction between registered and unregistered interest in land under the National Land Code. Thus he said (at pp. 463-464) of the reported case:

> Where there is a valid binding contract for the sale of land, the purchaser, **when he has**

performed his side of the contract, acquires a right in personam, that is he acquires the right to the land as against the vendor personally but not good against the whole world. However, upon registration in accordance with the Code in his name, the vendor acquires a right in rem, that is a real right good against the world as a whole *(Bachan Singh v. Mahinder Kaur & Ors.).* Prior to registration of the title, the statutory form of transfer under the Code gives a title in equity to the purchaser until registration. The vendor is said to hold his proprietary interest as a constructive trustee. As soon as the transfer of title is registered in his name, the estate or interest of the transferor as set forth in the instrument with all rights, powers and privileges thereto pass to the purchaser (transferee). **In order to protect such equitable interest or estate, prior to the registration of transfer, a caveat may be lodged with the Registrar, and so long as it remains without being removed, it imposes restrictions on the entry in the register of dealings in land** *(Bachan Singh v. Mahinder Kaur & Ors.,Abigail v. Lapin).* If the vendor commits a breach of the agreement by refusing to transfer the land to the purchaser, the latter may file suit for specific performance of the agreement.

(Emphasis supplied).

Transposing the aforementioned principles to the present case there is no doubt that in the circumstances of the present case the plaintiff has acquired only a right *in personam* to the said property against the 1st defendant, as vendor, personally particularly since he has indicated in his pleading as well as in his evidence, that he is ready and willing to pay the balance of the purchase price thereby fulfilling his obligations under the said agreement. But his right in personam is not good against the 2nd defendant. On the other hand the 2nd defendant has acquired a right *in rem* to the said property under the charge which had been duly registered. Their right is "a real right good against the world as a whole." That being the position, the plaintiff therefore has sought to rely on the fraud exception stipulated in s. 340(2)(a) of the National Land Code 1965 in order to nullify the said charge.

I should therefore, first of all deal with this issue of "fraud." In this aspect of the case I must bear in mind that, the main if not the sole complaint of the plaintiff is that in the circumstances of this case the 2nd defendant or their representatives should as a prudent person would have made enquiries as to whether or not the various lots of land had already been sold to third parties at the material time. Had they done so they would certainly have known that the said lots inclusive of lots P.T. 4042 had already been sold and that sale and purchase agreements had been executed between the 1st defendant and the purchasers. Furthermore the 2nd defendant would surely know that the sale and purchase agreements would contain a term prohibiting the charging of the relevant lot without the consent of the purchaser as specifically expressed in r. 12(1)(b) of the Housing Developers (Control and Licensing) Rules 1970.

Now let us examine the evidence to see whether the allegations of the plaintiff against the 2nd defendant can be sustainable? Firstly Counsel for the plaintiff in his submission argued that the said agreement, P10, was deliberately not shown to PW6, the solicitor acting for the 1st defendant as well as the plaintiff and PW6 was given only the master title of the lands to check when the said master title at the material time had no encumbrances endorsed therein. Secondly the Magnum charge was again deliberately omitted from the said agreement. Thirdly an agreement was entered into by Pattaya Holdings Sdn. Bhd. with some of the shareholders of the 1st defendant whereby the said shareholders sold their shares to Pattaya Holdings Sdn. Bhd. Counsel pointed out that it was clearly stated in the agreement of sale of the shares that lot P.T.4042 was sold for RM163,910/- and that a sale and purchase agreement had been executed and handed to the purchaser(see p.28 of Bundle 'AB').Fourthly DW1, an experienced Senior Operation Officer of the 1st defendant was fully aware that the 1st defendant was a housing developer and that they were developing the housing estate. He also knew that the 1st defendant was issued with a housing developer advertisement permit 'P5'. DW1 further intimated that he was aware of the legal imlplications behind loan applications yet the only steps he took was to inquire from the directors of the 1st defendant who were also the directors of Pattaya Holdings Sdn. Bhd. whether they had launched the sale of the various lots. On receipt of a negative reply DW1 took no further steps apart from ensuring that the charge was duly registered with the relevant Land Office without

any objection from any person. Based on the aforesaid arguments learned Counsel therefore submitted that the facts of the present case the 2nd defendant's suspicions that something was not right would have been aroused. They should therefore have carried out further enquiry but they deliberately failed to do so for fear of learning the truth. Counsel then cited the following passage from the judgment in *Assets Co. Ltd. v. Mere Roihi (supra):*

> But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.

With due respect I cannot accept the arguments of the Counsel for the plaintiff in support of the plaintiff's case against the 2nd defendant. It is no doubt true that DW1 was fully aware that the 1st defendant was a housing developer and was at the material time embarking on the development of the housing estate. It is equally true that DW1 was fully aware that he was shown the housing developer advertising permit 'P5'. But it is important to note that the said advertising permit P5 shown to him was issued on 11 February 1980 and expired on 10 February 1981. When the loan application of Pattaya Holdings Sdn. Bhd. was made on 14 January 1982 (exhibit 'P13") P5 had already expired almost a year earlier. There is therefore no reason for DW1 to disbelieve Lee Meow Tuck a director of the 1st defendant as well as of Pattaya Holdings Sdn. Bhd. when the latter said that the launching of the sale of the various lots of land had yet to be carried out since at the material time it would clearly appear to DW1 that the 1st defendant had no valid advertising permit and therefore they could not launch the sale of the various lots until they had P5 renewed. Furthermore the statement of Lee Meow Tuck was confirmed by (i) the enquiry made by DW1 with representative of Pattaya Holdings Sdn. Bhd. and (ii) the fact that the subsequent charge in favour of the 2nd defendant was duly registered without any objection from anyone.

Apart from what has been said earlier, I am not aware of any law which provides that before a chargee can accept a charge on lands which are to be developed by a developer as a housing project wherein the subdivided lots with buildings to be constructed thereon are to be sold to members of the public, the said chargee must ensure that no sale of the subdivided lots has yet been carried out or that no sale and purchase agreement has been executed by the chargor. Be that as it may nevertheless as a matter of prudence a financier would no doubt check or cause to be checked whether there is any prohibition in the sale and purchase agreements executed by the developer with purchasers of such lands against the creation of a charge of the said lands. The manner in which such check should be carried out is left entirely to the financier. In the present case DW1 had carried out such check by way of making enquiries with the directors of the 1st defendant and Pattaya Holdings Sdn. Bhd., the borrower. As he was satisfied with the assurance given by the said directors that the launching of the sale had not yet been carried out, it is to my mind highly incredible to suggest that DW1 deliberately abstained from making further enquiries "for fear of learning the truth" and hence fraud might be properly ascribed to him or the 2nd defendant. Furthermore it is equally inconceivable that if DW1 had any suspicion concerning the incapacity of the 1st defendant to charge the said property he would deliberately abstain "from making enquiries for fear of learning the truth." It is certainly more logical to expect DW1 as an experienced and trusted employee of the 2nd defendant to carry out further enquiries without hesitation should he have any suspicions of the incapacity on the part of the 1st defendant to operate a charge on the various lots. Indeed should he abstain from doing so he knew or ought to have known that his inaction might well cause great loss to his employer, the 2nd defendant upon their dispersing of a loan of RM2.8 million based on a defective charge. No reasonable person in the shoes of DW1 would have deliberately omitted to carry out such an essential part of his duties simply because in omitting to do what he was bound to do he had nothing to gain. On the contrary he had everything to lose. From this discussion it is idle to suggest that the 2nd defendant or DW1 is privy to the fraud committed by the 1st defendant against the plaintiff. Upon a careful review of the facts and circumstances of the present case, the most that can be said against the 2nd defendant is that they have been negligent in not carrying out further enquiries. But negligence per *se* does not and cannot amount to fraud.

In any event there is no evidence at all to show that the designed object of the charge created over the various lots is to cheat the respective purchasers including the plaintiff. Neither is there any evidence to prove dishonesty of some sort against the 2nd defendant or their representatives. The plaintiff has to my mind failed to prove fraud against the 2nd defendant even if such proof is based on the balance of probability let alone when it is based on the standard of proving beyond reasonable doubt.

As regards to the second ground relied upon by the plaintiff to sustain his charge that the registration of the said charge was obtained by means of an insufficient or void instrument I need only to say that based on my findings which have been fully discussed earlier, I cannot find anything in the present case to suggest let alone to prove that the 2nd defendant failed to act in good faith and for valuable consideration in executing the said charge. Even though I agree with Counsel for the plaintiff when he said that "the plaintiff belongs to a class of persons for whom the statutory protection (under r. 12(1)(b) of the Housing Developers (Control and Licensing) Rules 1970) is imposed" and therefore he can recover the said property charged without his consent but it must be noted that the said statutory protection is given to a purchaser as against an unscrupulous developer and not against a third person (as in the present case the 2nd defendant chargee) who acquired the legal interest in good faith and for valuable consideration. The 2nd defendant in this case is fully protected pursuant to the proviso to subsection (3) of s. 340 of the National Land Code 1965 (see *Tai Lee Co. Sdn. Bhd. v. Official Assignee &* Ors. [1983] 1 MLJ 81 @ 83-84).

For the above reasons the claim of the plaintiff against the 2nd defendant is dismissed with costs.

One final matter which I must mention is that after having written the above grounds of my judgment I read through the notes of proceeding one more time and I found that I had not placed sufficient significance on a statement made in the testimony of PW2, the investigating officer and prosecutor of the department of the Registrar of Companies. This witness testified that the 1st defendant Company was and still is under liquidation pursuant to an Order of the Court dated 22 January 1988. That being the case the plaintiff is prohibited from proceeding with this action against the 1st defendant pursuant to s. 226(3) of the Companies Act 1965 which reads:

> (3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except -
>
> (a) by leave of the Court; and
> (b) in accordance with such terms as the Court imposes.

There is no evidence in the present case that the plaintiff has obtained leave of the Court to proceed with this action against the 1st defendant in liquidation. The fact that the plaintiff did not proceed to apply for judgment in default of pleading and even at the trial of the case before me suggests that he knows that the 1st defendant has been wound up and it is logical to presume that he also knows that the 1st defendant is in no position financially to comply with any order of the Court prayed for by the plaintiff. In other words the plaintiff is aware that he could get practically nothing from 1st defendant company under liquidation. His only reason for not obtaining leave from the Court to enable him to proceed with this action against the 1st defendant in liquidation and still continue the proceeding against the 1st defendant is to my mind merely to establish fraud on the part of the 2nd defendant in that the latter colluded and participated in the said fraud committed by the 1st defendant. For the aforementioned reasons I hereby revoke my earlier finding that judgment be given to the plaintiff against the 1st defendant. However that may be in the event that the plaintiff had obtained leave of Court to proceed with this action against the 1st defendant but he has failed to inform this Court of the grant of the required leave then he would be entitled to judgment against the 1st defendant and the appropriate order I would have made would be as follows:

> (1) The plaintiff's prayer for specific performance of the sale and purchase agreement made with the 1st defendant on 4 May 1991 cannot be granted pursuant to s. 23(b) of the Specific Relief Act 1950;
> (2) Likewise the prayer for injunction restraining the 1st defendant from selling or otherwise dealing with the said property must be rejected since the said property has already been charged to the 2nd defendant who had

already obtained order of Court to sell the same.

(3) The prayer for damages would be allowed and assessment of the damages would be dealt with by the SAR.

As regards the plaintiffs action against the 2nd defendant, I repeat the said action is dismissed with costs. The caveat lodged by the plaintiff over the said property should be removed. The order of Court giving leave to the 2nd defendant to proceed with the auction of the charged lands is still valid as it was obtained prior to the 1st defendant going into liquidation. The 2nd defendant is given liberty to apply to this Court for a new date to proceed with the public auction of the said property.

LLOYDS BANK PLC

v.

ANG CHENG HO QUARRY & 3 ORS.

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
SUIT NO. KG 487 OF 1987
31 DECEMBER 1992

PRACTICEANDPROCEDURE. Taxation of costs- Applicant claiming getting-up fee including brief fee for Counsel • Respondent claiming that suit was settled before action had been set down for trial - Whether applicant entitled to getting-up fee - Review by Judge - Principles applicable on review.

The applicant and the respondent were sued as principal and guarantor respectively under credit facilities granted by the plaintiff to the respondent. After the plaintiff had taken out an O. 14 application, the respondent settled the claim and the plaintiff withdrew the suit. The applicant applied for his costs of the action against the plaintiff and it was ordered that the respondent pay the applicant's costs of the action including costs occassioned by the plaintiffs application for summary judgment which was subsequently withdrawn.

A dispute arose as to the getting-up fees claimed by the applicant under Article 152 of the Bill of Costs with the respondent claiming that the item should be disallowed altogether or alternatively that the sum awarded should be reduced on the grounds that:

(a) no novel point of law or point requiring specialised knowledge of any particular field was involved,

(b) as the application was for sumary judgment, the applicant needed only raise a triable issue,

(c) the applicant did not present his case because of settlement,

(d) brief fee paid to Counsel in Singapore and time spent in consultation should not be considered at all.

Held:

[1] There was no limitation on the Court's power to review any decision of a taxing master, whether on quantum, fact or otherwise.

[2] From the nature of the action, the amount of claim involved, the averments and allegations disclosed and raised in the pleadings and